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Paper No. 10

Fritz Schaefer
Industrial Microwave Technologies, Inc.
545 Brandywine Drive
Colorado Spring, CO 80906

COPY MAILED

AUG 12 2003

OFFICE OF PETITIONS

In re Application of :
Fritz Schaefer : DECISION ON PETITION
Application No. 09/669,400 :
Filed: September 22, 2000 :
Title: PROCESS FOR TREATING WASTE :
OIL :

This is a decision on the petition under 37 CFR 1.137(a), filed August 4, 2003, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)," as appropriate. Extensions of time under § 1.136(a) are permitted.

The above-identified application became abandoned for failure to timely file a proper reply to the Notice of Non-Compliant Amendment (37 CFR 1.121) mailed August 15, 2002. This Notice set a time period of ONE MONTH from the mailing date of the notice to meet the requirements of 37 CFR 1.121, with extensions of time obtainable under § 1.136(a). No reply having been received and no extensions of time obtained, the application became abandoned effective September 16, 2002. A courtesy Notice of Abandonment was mailed on May 2, 2003. In response, petitioner timely filed the instant petition under § 1.137(a).

35 U.S.C. §133 provides that the Commissioner may revive an application if the delay in replying to the outstanding Office action is shown to the satisfaction of the Commissioner to have been unavoidable. A grantable petition to revive an unavoidably abandoned application under 37 CFR § 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR § 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to § 1.137(d). Requirement (3) is at issue in this case.

The burden of showing the cause of the delay is on the person seeking to revive the application. Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. 977, 982 (D.C. Cir. 1982). Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the "reasonably prudent person standard" in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

Petitioner asserts that the delay in replying to the Notice was unavoidable as he never received the Office action dated August 15, 2002. However, petitioner submitted no docket records in support of this contention and included no statements attesting to the fact that a search of the file jacket and docket records indicated that the Office communication was not received.

A review of the Notice mailed August 15, 2002 reveals that the Office letter was mailed to the correspondence address of record. The record reveals no irregularity in mailing. Petitioner's evidence does not overcome the presumption that the communication was properly mailed to the applicant at the correspondence address of record. The showing required to establish non-receipt of an Office communication must include a statement from the pro se applicant stating that the Office communication was not received by applicant and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. In addition, a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in applicant's statement. Petitioner has not submitted such evidence. See MPEP 711.03(c).

Having not made an adequate showing of non-receipt of the Office action or otherwise, shown unavoidable delay, the petition cannot be granted under §1.137(a).

Alternative Venue

While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is not precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR § 1.137(b) on the basis of unintentional delay. A grantable petition under § 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR § 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to § 1.137(d).

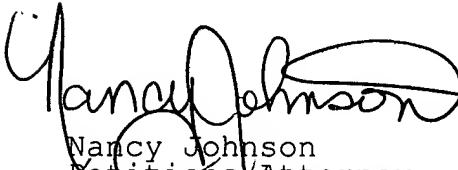
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (703) 308-6916
 Attn: Office of Petitions

By hand: Office of Petitions
 2201 South Clark Place
 Crystal Plaza 4, Suite 3C23
 Arlington, VA

Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0309.


Nancy Johnson
Petitions Attorney
Office of Petitions